Supreme Court of the United States

OCTOBER TERM, 1941

No. 511

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Petitioners,

vs.

THE CITIZENS NATIONAL BANK IN ABILENE,
Respondent.

REPLY TO BRIEF OF RESPONDENT

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To the Honorable the Supreme Court of the United States:

Denial of the petition for writ of certiorari is sought upon three grounds, namely: (1) no federal question is involved; (2) if it were, it was not timely raised in the state court; and (3) the judgment rendered by the Supreme Court of Texas was a correct one.

A Federal Question Is Involved

This is not a case of mere erroneous decision. It is a case of arbitrary action; hence the federal question under the due process clause of the 14th Amendment.

The Texas and Pacific Railway Company and R. H. Locke entered into a simple unambiguous contract under which Locke was required to pay *all* persons furnishing labor or materials and supplies on the contract job, whether liens were filed or not (R. 30, 32). Under a majority

opinion, the Texas Supreme Court has arbitrarily changed the contract and excused Locke from paying such parties because they did not file liens against the Railway Company. Such action, we say, violates the due process clause of the 14th Amendment, *Muhlker v. New York & H. R. Co., 197 U. S. 544, 570, 49 L. ed. 872, 878, Postal Tel.-Cable Co. v. Newport, 247 U. S. 464, 473, 62 L. ed. 1215, 1220,* and it "is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights' ", *American Railway Exp. Co. v. Kentucky, 278 U. S. 269, 273, 71 L. ed 639, 641.*

Regardless of what the Texas Supreme Court has said, this Court will determine for itself whether the contract is ambiguous, and its proper construction and effect, *Appleby v. New York, 271 U. S. 364, 379-380, 70 L. ed. 992, 999.* Upon such investigation, we are certain this Court will find, as did the Texas Court of Civil Appeals (R. 69) and the dissenting Texas Supreme Court Justice (R. 137), that there is no ambiguity in the contract; that it violates no law or public policy (R. 139), and that it is the duty of the courts to enforce it as written (R. 139). Such holding would be in accord with this Court's declaration that "competent persons shall have the utmost liberty of contracting" and "their agreements voluntarily and fairly made shall be held valid and enforced in the courts", *Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353, 356, 75 L. ed. 1112, 1116.*

The 14th Amendment declares that "No State shall * * * deprive any person of life, liberty, or property without due process of law * * *". Respondent ignores this constitution-

al provision as well as the following decisions relating thereto:

The "right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution", *Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 566, 55 L. ed. 328, 338; Allgeyer v. State of Louisiana, 165 U. S. 578, 589-590, 41 L. ed. 832, 835-836.*

The 14th Amendment to the Federal Constitution "governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers' " and "upon the state courts, equally with the courts of the Union, rests the obligation to guard and enforce every right secured by that Constitution", *Mooney v. Holohan, 294 U. S. 103, 113, 79 L. ed. 791, 794.*

"The due process clause requires 'that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' ", *Brown v. Mississippi, 297 U. S. 278, 286, 80 L. ed. 682, 687.*

The power of a state court "cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States", *Muhlker v. New York & H. R. Co., 197 U. S. 544, 570, 49 L. ed. 872, 878.*

The existence of a substantial federal question in this case is clearly disclosed by the application of these principles.

The Federal Question Was Timely Raised

There is no merit to Respondent's contention that the federal question was not timely raised.

Prior to the decision of the Texas Supreme Court in the instant case, the law in Texas was:

> "So long as no statute is infringed" parties may "bind themselves to each other as they see fit, with respect to obligations imposed by the contract", *Reef v. Mills Novelty Co. (Com. App., Sec. A; opinion adopted by Supreme Court), 89 S. W. (2d) 210, 211.*
>
> "Terms of contract free from ambiguity and not against the policy of the law to enforce establish the right of the parties thereto", *Burns v. American Nat. Ins. Co. (Com. App., Sec. B; opinion adopted by Supreme Court), 280 S. W. 762, 765.*
>
> "There are some rules applicable for the construction of written contracts, for the purpose of ascertaining from the language used the manner and extent to which the parties intended to be bound. Courts, however, are not permitted to resort to arbitrary rules of construction where the intention of the parties is expressed in clear and unambiguous language * * * but will enforce the contract according to its terms * * *. As is well said by Chief Justice Cureton in Texas Farm Bureau Cotton Ass'n v. Stovall, 113 Tex. 273, 253 S. W. 1101: 'The primary test of the character of a contract is the parties' intention as manifested by its terms' ", *Magnolia Petroleum Co. v. Connellee (Com. App., Sec. B; opinion adopted by Supreme Court), 11 S. W. (2d) 158, 159.*
>
> "A 'condition precedent' is such as must happen or be performed before a right can accrue to enforce an obligation dependent upon the happening or performance thereof against another in favor of one claiming such right", *Burns v. American Nat. Ins. Co. (Com. App., Sec. B; opinion adopted by Supreme Court), 280 S. W. (2d) 762, 765.*
>
> "It is quite elementary that an instrument payable upon a condition which does not import an absolute

liability is not payable until that condition has happened", *Ferguson v. Mansfield (Sup. Ct.), 263 S. W. 894, 900.*

"We are not prepared to hold that the railroad company might not have required of the contractors a bond binding them and sureties to pay all debts contracted with persons for labor, material or other things necessary to the performance of the contract, whether the claims might be asserted against the railroad company's property as a lien or not * * *", *National Bank v. G. C. & S. F. Ry. Co. (Sup. Ct.), 95 Texas 176, 184, 66 S. W. 203, 205.*

"The contention that Roddy (the owner), by accepting the assignment to the bank and promising to pay to the bank, at maturity, the final installment of the note, became unconditionally bound to pay said sum to the bank, cannot be sustained. The acceptance and promise imports nothing more than that said portion of the note would be paid according to the terms of the building contract and of the note itself. As already shown, payment of this part of the note depends partly on satisfactory proof being furnished Roddy, or the architect, that all bills for labor and material have been paid. The bank took the note subject to the right of the Roddys and of the insurance company to apply, or have applied, the $20,000 installment of the note to the purposes for which such fund was created, which included payment of claims for labor and material" *American Employers' Ins. Co. v. Roddy (Com. App., Sec. A; opinion adopted by Supreme Court), 51 S. W. (2d) 280, 284.*

In light of this settled law in Texas, it cannot be said that petitioner should have anticipated that the Texas Supreme Court would refuse to enforce and would change by construction this plain unambiguous contract in violation of the 14th Amendment and contrary to this Court's declaration that the power of a state court "cannot be ex-

ercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States", *Muhlker v. New York & H. R. Co., 197 U. S. 544, 570, 49 L. ed. 872, 878.* As soon as the arbitrary action of the Texas Supreme Court was made known by the filing of its opinion (R. 127), petitioner raised the federal questions by motion for rehearing (R. 143) which is a matter of right under Texas law (petition for certiorari, pages 17-18). Filing of the motion prevented the judgment of the Supreme Court from becoming final, *Article 1772, Vernon's Revised Civil Statutes of Texas, 1925.* By overruling the motion for rehearing "after due consideration of same" (R. 163), the Supreme Court of Texas denied the asserted federal rights.

This case clearly falls within the principles announced in the following cases:

A federal claim is timely "if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it", *Herndon v. Georgia, 295 U. S. 441, 444, 79 L. ed. 1530, 1533; Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 677-678, 74 L. ed. 1107, 1112; Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U. S. 313, 320, 74 L. ed. 870, 876.*

"When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect", *Norris v. Alabama, 294 U. S. 587, 590, 79 L. ed. 1074, 1077.*

State courts shall "not be the final arbiters of important issues under the Federal Constitution", *Minnesota v. National Tea Co., 309 U. S. 551, 557, 84 L. ed. 920, 924.*

The Judgment Violates Constitutional Rights

The contracting parties intended, by their own simple unambiguous language, that *all* persons furnishing labor, materials and supplies should be paid. As stated by the dissenting Supreme Court Justice, this is "natural and altogether commendable" (R. 138), and if the parties desire to do that, "why should the courts prevent it?" (R. 139). But the judgment of the Texas Supreme Court has prevented it, and these parties must go unpaid because that Court arbitrarily has refused to enforce the contract as written and has forced upon the parties a contract which they did not make, contrary to and in violation of the 14th Amendment.

We respectfully submit that this Court should exercise its primary function of "safe-guarding the liberty of the citizen against deprivation through the action of the State", *Mooney v. Holohan, 294 U. S. 103, 112, 79 L. ed. 791, 794,* and that it should review and "make such disposition of the case as justice requires", *Minnesota v. National Tea Co., 309 U. S. 551, 555, 84 L. ed. 920, 923; Patterson v. Alabama, 294 U. S. 600, 603, 79 L. ed. 1082, 1083-1084.*

Respectfully submitted,

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